(26,302)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 835.

WILLIAM H. SAGE, HENRY M. SAGE, AND JAMES FENIMORE COOPER, EXECUTORS OF THE LAST WILL AND TESTAMENT OF DEAN SAGE, DECEASED, APPELLANTS,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

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JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., MAY 7, 1918.

1 Court of Claims.

No. 33703.

WILLIAM H. SAGE, HENRY M. SAGE and JAMES FENIMORE COOPER, as Executors of the Last Will and Testament of Dean Sage, Deceased,

VS.

THE UNITED STATES.

I. Petition and Amended Petition.

On January 23, 1917 the claimants filed their original petition.
On March 16, 1917 the defendants filed a demurrer to said petition.
On May 7, 1917, by leave of court, claimants filed an amended petition which is as follows:

Amended Petition.

Filed May 7, 1917.

To the Honorable the Chief Justice and the Judges of the Court of Claims:

Your petitioners, William H. Sage, Henry M. Sage and James Fenimore Cooper, as executors of the last will and testament of Dean Sage, deceased, late of the County of Albany, and State of New York, respectfully represent:

I.

On June 13, 1898, the President of the United States approved an act entitled "An Act to provide ways and means to meet war expenditures and for other purposes" (30 Stat., 448, 464-5), by section 29 of which legacies and distributive shares arising from personal property became subject to a tax. Portions of said section
2 29 material to this case are as follows:—

"Section 29. That any person or persons having in charge or trust, as administrators, executors, or trustees, any legacies or distributive shares arising from personal property, where the whole amount of such personal property as aforesaid shall exceed the sum of ten thousand dollars in actual value, passing, after the passage of this Act, from any person possessed of such property, either by will or by the intestate laws of any State or Territory, or any personal property or interest therein, transferred by deed, grant, bar-

person entitled thereto may maintain such an action against him, as the case requires." (Sec. 1,819.)

VI.

The estate of the said decedent was administered by the said executors diligently and in all respects subject to and in accordance with the laws of the said State of New York. On July 1, 1902, the amount of the debts of said decedent due and payable out of his said estate had not been and could not have been ascertained; what, if anything, would remain out of his said estate for the satisfaction of legacies had not and could not have been ascertained; the time for the payment of legacies, if funds should remain for that purpose, had not arrived and the net, actual or clear value of the said estate and of the interests therein, or any of them, had not and could not have been ascertained.

VII.

On or about June 25, 1903, the United States Collector of Internal Revenue for the Fourteenth District of New York, represented and claimed to your petitioners that a tax in the sum of Sixty-three Thousand Nine Hundred and Forty and 88/100 Dollars ($63,940.88), under the provisions of the Act of Congress of June
6 13, 1898, had been assessed and had become lawfully due to the United States and, thereupon said Collector demanded the payment to him of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) and your petitioners, under protest that neither they nor the said estate were lawfully liable therefor, paid the sum of Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), as aforesaid, to said Collector. The whole of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) was thereafter, in the ordinary course of business of said Collector, by him turned over and paid to the United States and is now held in the Treasury of the United States.

VIII.

On or about August 24, 1903, application was made to the Commissioner of Internal Revenue, in accordance with Section 3,220 of the Revised Statutes of the United States, for the refund of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), the ground stated in said application for refund being that the legacies arising out of the estate of the said decedent were not subject to taxation under section 29 of the Act of June 13, 1898, and amendments. On or about September 24, 1903, the said application was denied. On or about September 19, 1905, your petitioners brought suit in the United States Court for the Northern District of New York, against John G. Ward, as the said Collector, for the recovery of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), and in said suit your peti-

tioners subsequently, on or about May 17, 1912, obtained judgment against said John G. Ward, in the sum of Thirty Thousand, Two Hundred and Seventy-five and 49/100 Dollars ($30,275.49), with interest and costs, which said judgment was satisfied by the United States.

7 IX.

On or about September 7, 1916, your petitioners made application to the Secretary of the Treasury, in accordance with the Act of Congress of June 27, 1902, and the regulations of the Treasury Department thereunder, asking and demanding of said Secretary of the Treasury, as therein provided, the repayment to them of the remaining Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39), retained by the United States out of said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88), which application was, on or about October 30, 1916, disallowed and rejected, on the ground, as stated in a letter, written under authority of the said Secretary of the Treasury, that—

"A claim for the refund of $63,940.88, the entire amount of tax paid, was rejected September 24, 1903. Subsequent to the rejection of this claim suit was brought for the recovery of the amount claimed in the U. S. Circuit Court for the Northern District of New York, and a judgment in amount of $30,275.49, together with interest and costs, was rendered. Since any rights the claimants might have had under recent decisions of the Supreme Court were merged in this judgment, the claim is hereby rejected."

There has been, and now is, retained by the United States the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39) of the said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) which Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 — ($33,665.39) is now due and remains unpaid to your petitioners. The Secretary of the Treasury has refused, and continues to refuse, to refund and pay said sum to your petitioners.

8 X.

Your petitioners are advised by Counsel and therefore aver:

First. That on July 1, 1902, and at all times prior thereto, after the death of the said Dean Sage, the interests upon or in respect of which the said Sixty-three Thousand, Nine Hundred and Forty and 88/100 Dollars ($63,940.88) was collected were, within the meaning of the Act of June 27, 1902, contingent beneficial interests which had not become absolutely vested in possession or enjoyment.

Second. That the said suit of your petitioners against the said Ward was not a suit against the United States and was not a suit to enforce a refund authorized and directed by said Acts of June 27, 1902, and July 27, 1912, and, therefore, in no way bars the rights of your petitioners to claim the refund to them which said Acts of June 27, 1902, and July 27, 1912, command.

XI.

Wherefore your petitioners aver that there is justly owing to them, by the defendants, on account of the facts herein set forth, the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39), after deducting all just set-offs and demands on the part of the United States; and they further aver that they are the sole owners of the claim herein sued upon, and that no transfer or assignment of said claim, or any part thereof, or interest therein, has ever been made; that your petitioners are citizens of the United States and of the State of New York and have not in any way voluntarily aided, abetted or given encouragement to rebellion against the United States; and that they believe the averments in this petition to be true.

9 *Prayers.*

The premises considered, your petitioners pray:

1. That this Honorable Court will render judgment against the United States for the the sum of Thirty-three Thousand, Six Hundred and Sixty-five and 39/100 Dollars ($33,665.39) in favor of petitioners.

2. That petitioners may have such other and further relief as the nature of the case may require and to this Honorable Court may seem meet and proper.

H. T. NEWCOMB,
Attorney for Petitioners.

DISTRICT OF COLUMBIA, *ss:*

Personally appeared before me, a Notary Public in and for the said District of Columbia, H. T. Newcomb, who being duly sworn according to law, deposes and says that he is duly authorized, by power of attorney heretofore filed, to verify this petition and prosecute this cause, that he has read and understands the foregoing petition, and that the matters and things therein set forth are true in substance and in fact, as he is informed and believes.

H. T. NEWCOMB.

Subscribed and sworn to before this 7 day of May, 1917.

(Signed) ETHEL D. PITNEY,
Notary Public.

10 EXHIBIT A.

Last Will and Testament of Dean Sage.

Proved and Recorded July 9th, 1902, as a Will of Real and Personal Estate.

I, Dean Sage, of Menands, Albany county in the State of New York hereby make this my last will and testament, revoking all former wills.

First, I direct that my just debts be paid by my executor hereinafter named, as soon after my death as may by them be found convenient.

Second, I direct that the interests I have in the business of the firm of H. W. Sage & Co., be withdrawn and my portion set aside as soon as may be without injury to the interests of the surviving partners. My interest in the Sage Land & Improvement Company being represented by stock may remain as it is, subject to division with the rest of my estate among my heirs, who I desire should hold this stock as I regard it of great prospective value. The interests that I have with any other persons besides the firm of H. W. Sage & Co. I direct shall be closed up as soon as practicable and wise.

Third, I direct that my executors shall purchase and present to my aunt, Miss C. A. Linn, should she survive me, a suitable gift of the value of five hundred dollars as a token of the appreciation I have of her unselfish devotion to me and to my children.

Fourth, I give to my nephew, Henry W. Sage, the vase presented to my father by the trustees of Cornell University to be kept by said Henry W. Sage during his life, and at his death to go to my eldest male descendant by the name of Sage. If there be no such descendant, then to the eldest male descendant of my daughters. And it is my wish that so far as possible said vase shall be retained among my descendants by the name of Sage.

11 Fifth, I have promised David H. Patton of Albany that in case his son Dean Patton is able to get one of the State scholarships by which he is admitted as a free student to Cornell University, I will pay his board at a reasonable price during the time he remains at Cornell University under the terms and conditions of the scholarship. The payment to be only for such time as Dean Patton may be engaged in his studies at the University at Ithaca. Should I die before these conditions may be fulfilled, I would like my executors to carry out this provision in case it becomes operative through young Patton obtaining the State scholarship.

Sixth, I direct that my wife Sarah M. Sage shall have the free use, during her life, of my residence at Menands near Albany, and of the furniture, books and all equipment connected therewith, should she so desire. Should she wish to live elsewhere, I direct that the place at Menands should be sold and the proceeds thereof and enough more from my estate to make $50,000, invested in the purchase of such a residence elsewhere as she may choose to occupy for her life—the property, if any, thus acquired, to revert to my children or their heirs at the death of my wife.

Seventh, One-third of the remainder of my property of every kind, I give to my executors in trust to receive the rents and profits thereof and apply the same to the use of my wife during her life.

Eighth, The residue of my property of every kind I give to my executors in trust to divide the same into as many shares as I shall have children who survive me and children who may die before me leaving descendants. One such share to be paid and delivered by my said trustees to each of my sons who shall be over twenty-five years of age, and one to each of my daughters who shall be over

thirty-five years of age, at the time of my death; my said trustees to collect the rents, profits and income of each remaining share and apply the same to the use of each of my surviving children, in the case of sons until they shall arrive at the age of twenty-five
12 years and of daughters until they shall arrive at the age of thirty-five years, when the principal sum of said trust shall be paid to them, respectively. In case any of my children shall die before me or after me but before they shall arrive at the age at which they are to receive the principal of their shares as above, leaving descendants, then I direct that the share of each such child so dying shall be divided into as many shares as such child shall leave descendants living, and one such share shall be held in trust for each such descendant living at my death until in the case of boys they shall arrive at twenty-five years of age and of girls at thirty years of age; and in the case of such descendants not born until after my death, until they arrive at the age of twenty-one years. The rents and profits of each share to be applied, so far as necessary, for the support and maintenance of such descendants, and the balance thereof to be accumulated until they arrive respectively at the age of twenty-one years, and then paid to them; and thereafter the entire annual income to be applied to their use.

Ninth, I give my said trustees and their successors power to advance to any of my descendants, if to them it should seem best, a sum not exceeding in amount one-third of the share left to such descendant by this will, such advance only to be made after any such descendants shall arrive at the age of twenty-one years.

Tenth, Upon the death of my wife, I direct that that portion of my property hereby left to her for her life, shall be treated in the same manner as the residuum of my estate, except that the shares of the descendants of my children, if any, shall only be held in trust for each such descendant until he or she arrives at the age of twenty-one years.

Eleventh, In the division of the portion of my estate going to my children, I direct that my executors shall first deduct such sums as I have applied and may hereafter apply to the settlement in life of my children—they consist now of the money I paid for my
13 daughter Susan's house, about $22,000, and the money I gave my son Henry at the time of his marriage, about the same sum; on which and on all future expenditures of this character I desire no interest shall be charged. There is also due me now a note of my son Henry for the purchase of stock in the Sage Land & Improvement Co., which, with interest, is to be deducted from his share in my estate.

Twelfth, I direct that so soon as all or any part of my estate shall come into the hands of my executors, it be invested by them in any sound and solid securities—excluding everything of questionable or speculative value, and to accomplish this, I empower my executors and trustees, and their successors, to sell or lease, resell or re-lease any part of my estate, real or personal, they may deem fit, and to invest from time to time the proceeds of such sales as to them may seem

best, not confining them to th investments which trustees are authorized by law to make.

Thirteenth, I appoint as my executors and trustees my brother William H. Sage, my son Henry M. Sage and my son-in-law, James Fenimore Cooper, and the power of appointing successors to this trusteeship and executorship shall accrue to any two of the executors and trustees of this will on the death or disqualification of their associate. I desire, however, that the first vacancy after the majority of my son Dean Sage Jr., shall be filled by him, and vacancies occurring thereafter shall be filled by persons of my own blood if practicable and unobjectionable.

In testimony whereof, I have hereunto set my hand and seal this eighteenth day of February, A. D. 1899.

DEAN SAGE. [L. S.]

In the presence of:
FREDERICK TOWNSEND.
JAMES F. TRACEY.
SARAH E. PORTER.

14 Signed and sealed as, and published and declared to be his last will and testament by the above-named testator, in our presence and in the presence of each and all of us, who have, at his request, in his presence and in the presence of each other, signed our names as attesting witnesses hereto, this attestation clause having first been read aloud to the testator in our hearing.

FREDERICK TOWNSEND,
Albany, N. Y.
JAMES F. TRACEY,
Albany, N. Y.
SARAH E. PORTER,
Albany, N. Y.

I, Dean Sage of Menands, Albany county, make this codicil to my last will and testament, dated February 18, 1899.

Should any of my descendants die without leaving issue, before arriving at the age fixed for the termination of the trust created of his or her share of my estate, at which age the principal of such trust fund is to go absolutely and be paid by my trustees to each such descendant, I give the share of the descendant so dying, if a child of mine, to my other children and to the descendants of any deceased child, per stirpes. If the one so dying is a grandchild, I give its share to its brothers and sisters, or if it have no brothers and sisters, then to my other descendants per stirpes.

The provision made for my wife in my will dated February 18th, 1899, to which this is a codicil, is intended to be in lieu of her dower.

By the provision of the eleventh subdivision of my will directing my executors to charge against the shares of my children sums applied by me to their settlement in life, I only intend to have so charged the sums heretofore given, or which I may hereafter give to

any of them in the nature of wedding presents, such as those
15 already given to my son Henry and my daughters Susan and Elizabeth, and which are intended by me to provide them each with a suitable home, or with the means of procuring one.

In witness whereof, I have hereunto signed my name and affixed my seal this fifth day of February, one thousand nine hundred.

DEAN SAGE. [L. S.]

Witnesses:

SARAH EVANS PORTER.
FREDERICK TOWNSEND.
FOSTER PRUYN.

Signed and sealed as, and published and declared to be a codicil to his last will and testament by the above-named testator in our presence and in the presence of each of us, who have, at his request, in his presence and in the presence of each other hereunto signed our names as attesting witnesses this 5th day of February, 1900, this attestation clause having been first read aloud to us in the presence of said testator.

SARAH EVANS PORTER,
330 *Madison Avenue, Albany, N. Y.*
FREDERICK TOWNSEND,
3 *Elk Street, Albany, N. Y.*
FOSTER PRUYN,
230 *State Street, Albany, N. Y.*

STATE OF NEW YORK,
Albany County, Surrogate's Court, ss:

I, Quentin S. McNeill, Clerk of the Surrogate's Court of the County of Albany, do hereby certify that I have compared the foregoing copy of the last Will and Testament of Dean Sage, of the Town of Colonie, Albany county, deceased, with the original thereof
16 on file and of record in this office, and have found the same to be a correct transcript therefrom, and of the whole of said original.

In testimony whereof, I have hereunto set my hand and affixed the seal of the Surrogate's Court of the County of Albany, this 22d day of August, A. D. 1916.

[SEAL.]

QUENTIN S. McNEILL,
Clerk of the Surrogate's Court.

EXHIBIT B.

The People of the State of New York to all to whom these Presents shall Come, or may Concern, send Greeting:

Know ye, that at a Surrogate's Court, held at the City and County of Albany, on the ninth day of July in the year of our Lord one

thousand nine hundred and two Letters Testamentary of the Last Will and Testament of Dean Sage late of the Town of Colonie, Albany county, deceased, were duly granted and issued by the Surrogate of the County of Albany to William H. Sage, Henry M. Sage and James Fenimore Cooper the Executors named in the Last Will and Testament of said deceased, and that the same are still valid and in full force.

In testimony whereof, we have caused the Seal of Office of our said Surrogate to be hereunto affixed. Witness, Newton B. Van Derzee, Surrogate of our said County, at the City of Albany, the 22d day of August in the year of our Lord one thousand nine hundred and sixteen.

[SEAL.] QUENTIN S. McNEILL,
Clerk to the Surrogate's Court.

17 II. *Demurrer to Amended Petition.*

Filed May 11, 1917.

Now come the defendants, by their Attorney General, and demurring to the amended petition filed herein state as ground thereof that the subject matter of the suit has been previously adjudicated, and state as further ground thereof that the claim is barred by the statute of limitations.

HUSTON THOMPSON,
Assistant Attorney General.

CHARLES H. BRADLEY,
Assistant Attorney.

18 III. *Argument and Submission of Demurrer.*

On January 9, 1918, the demurrer in this case was argued by Mr. Charles H. Bradley, for the defendants, and by Mr. Harry T. Newcomb, for the claimants, and the demurrer was submitted.

IV. *Judgment of the Court.*

Entered Jan. 14, 1918.

In this case it is ordered that the defendants' demurrer to the claimants' amended petition be sustained; and that the petition be and it hereby is dismissed.

By THE COURT.

19 V. *Claimants' Application for, and Allowance of, Appeal.*

Come now the claimants by their attorney, and pray an appeal to the Supreme Court of the United States from the judgment entered herein on the fourteenth day of January, nineteen hundred and

eighteen, sustaining the demurrer to claimants' amended petition and dismissing the said petition.

H. T. NEWCOMB,
Attorney for Claimants.

Filed Jan. 23, 1918.

Ordered, That the above appeal be allowed as prayed for.
By THE COURT.

Jan. 23, 1918.

20 Court of Claims.

No. 33703.

WILLIAM H. SAGE, HENRY M. SAGE and JAMES FENIMORE COOPER, as Executors of the Last Will and Testament of Dean Sage, Deceased,

vs.

THE UNITED STATES.

I, Sam'l A. Putman, Chief Clerk Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the order of the court sustaining the defendants' demurrer to the amended petition and dismissing the petition; of the application of the claimant for, and the allowance of, an appeal to the Supreme Court of the United States.

In Testimony whereof, I have hereunto set my hand and affixed the seal of said Court at Washington City this January 24, 1918.

[Seal Court of Claims.]

SAM'L A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 26,302. Court of Claims. Term No. 835. William H. Sage, Henry M. Sage, and James Fenimore Cooper, executors of the last will & testament of Dean Sage, deceased, appellants, vs. The United States. Filed January 28th, 1918. File No. 26,302.